STATE OF MICHIGAN

IN THE SUPREME COURT

* *

ELLEN M. OSTROTH and
THANE OSTROTH,

Plaintiffs,

JENNIFER L. HUDOCK and
BRIAN D. HUDOCK,

Plaintiffs / Appellees,

v

WARREN REGENCY, G.P., L.L.C
and WARREN REGENCY LIMITED
PARTNERSHIP,

Defendants,

and

EDWARD SCHULAK, HOBBS &
BLACK, INC., Architects and Consultants,

Defendants / Appellants.

Supreme Court Docket No. 126859
C/O/A Docket No. 245934

L/C Civil Action No. 00-1912-CE

AMICUS CURIAE AMERICAN INSTITUTE OF ARCHITECTS, MICHIGAN'S AMICUS BRIEF

THOMAS M. KERANEN & ASSOCIATES, P.C.
By: Frederick F. Butters, P45426
Attorney for Amicus Curiae
American Institute of Architects, Michigan
6895 Telegraph Road
Bloomfield Hills, MI 48031

TABLE OF CONTENTS

Page(s)

INDEX OF AUTHORITIES

Cases **Page(s)**

Court Rules

Statues

I. STATEMENT IDENTIFYING ORDER APPEALED FROM

Amicus Curiae American Institute of Architects, Michigan (hereinafter "AIAM") supports Defendant - Appellant Edward Shulak, Hobbs & Black, Inc.'s position in its Appeal taken by leave granted from the July 8, 2004 decision the Court of Appeals rendered in **Ostroth v Warren Regency G.P L.L.C., 263 Mich App 1; 687 N.W.2d 309 (2004)**. Although AIAM takes no position on the underlying substantive dispute, for the reasons stated herein AIAM urges this Court to reverse the Court of Appeals and reembrace the logic set out in **Witherspoon v Guilford, 203 Mich App 240; 511 NW2d 720 (1994)** on the question of the Application of the Statute of Limitations to Architects, Engineers and Contractors.

II. STATEMENT IDENTIFYING ALLEGATIONS OF ERROR AND RELIEF SOUGHT

In **Witherspoon, spura**, the Court, on the strength of a long line of cases that set the stage for that decision, held that **MCLA 600.5839** was a Statute of repose, which must read together with the limitations period for negligence claims set out in **MCLA § 600.5805(6)** in order to perform a complete Limitations / Repose analysis for claims against Architects, Engineers and Construction Contractors. That balanced reading of the two statutory provisions, which gave effect to all of the provisions of both Statutes, remained the State of Michigan law for ten years until the Court of Appeals rendered its ruling in **Ostroth, supra**.

In **Ostroth, supra**, the Court of Appeals inexplicably departed from the sound logic of **Witherspoon, supra**, and held that **MCLA § 600.5839** was a Statute of both limitation and repose, and that its provisions governed all claims against Architects, Engineers and Contractors to the exclusion of **MCLA § 600.5805**. In the wake of **Ostroth**, **MCLA § 600.5805** has no further application to claims against Architects, Engineers, and Contractors.

The departure from the well-reasoned **Witherspoon** rule is procedurally defective, and creates an irreconcilable conflict which warrants review and reversal by this Court.

III. STATEMENT OF ISSUES PRESENTED

A. Should **MCLA § 5839(1)** be read harmoniously with, rather than to the exclusion of, **MCLA § 5805** where the respective sections can be read in a harmonious manner such as to give meaning and effect to all provisions of both sections?

Plaintiffs / Appellees' Answers; "NO."

Defendants / Appellants' Answers; "YES."

Amicus Curiae AIAM Answers; "YES."

B. Did the Architectural profession exist at common law prior to the enactment of the Revised Judicature Act of 1961 where the Statute requiring the licensing of those who practice Architecture dates to 1937 and recognized malpractice claims occurred as early as 1898?

Plaintiffs / Appellees' did not Address this Question Below.

Defendants / Appellants' did not Address this Question Below.

Amicus Curiae AIAM Answers; "YES."

C. Should this Court review and reverse a Court of Appeals decision wherein the Court of Appeals inexplicably departed from established precedent, in violation of the "first out" rule as articulated at **MCR 7.215**?

Plaintiffs / Appellees' Answers; "NO."

Defendants / Appellants' Answers; "YES."

Amicus Curiae AIAM Answers; "YES."

D. Should this Court review and reverse a Court of Appeals decision wherein the Court of Appeals construed a statute such that the construction produces a variety of absurd results?

Plaintiffs / Appellees' Answers; "NO."

Defendants / Appellants Answers; "YES."

Amicus Curiae AIAM Answers; "YES."

IV. STATEMENT OF FACTS AND INTERESTS OF AMICUS CURIAE AIAM

Amicus Curiae AIAM is a corporate entity that is organized pursuant to, and relies for its existence upon, the laws of the State of Michigan. Although AIAM is an affiliate chapter of the national American Institute of Architects organization headquartered in Washington, D.C., it remains a separate entity. AIAM holds as its purpose and goals the advancement of the Architectural profession, the improvement of the built environment, and the enhancement of the quality of life of the Michigan citizenry to the extent that life is impacted by the built environment. The vast majority of all Michigan citizens spend the bulk of their lives in one place - indoors. Since the 1600 plus members of AIAM are engaged in one general function, the creation of indoors, it follows that the manner in which they practice their profession has a broad impact on the Michigan citizenry.

Until July 8, 2004, the Rule established in **Witherspoon v Guilford, 203 Mich App 240; 511 N.W.2d 720 (1994)** controlled the disposition of matters involving the Statute of Limitations defense under Michigan law relative to claims against Architects. Under the **Witherspoon** rule, the two-year limitation period for malpractice claims against Architects set out at **MCLA § 600.5805(6)** was to be read together with the six-year repose period (10 years in the case of gross negligence) set out at **MCLA 600.5839**. A traditional accrual analysis was employed, and claims were deemed time barred if they were not brought within two years of the date of accrual pursuant to **MCLA § 600.5805(6)**. If a claim did not accrue within six years of the date of use, occupancy or acceptance of the completed

improvement, it was time barred by the repose effect of **MCLA § 600.5839**.[1] Thus **Witherspoon** represented a balance reading of the two Statutes, giving effect to all of the terms of both.

On July 8, 2004, the Michigan Court of Appeals, in **Ostroth v Warren Regency, G.P, L.L.C 263 Mich App 1; 687 N.W.2d 309 (2004)** inexplicably cast aside the well-established **Witherspoon** and held that the six-year period set out in **MCLA § 600.5839** was in fact a period of limitations, and that it was the ***ONLY*** period that applied. That decision has two specific legal effects - 1) it strips **MCLA § 600.5839** of any repose effect; and 2) it renders the two-year malpractice period set out at **MCLA § 600.5805(6)** nugatory as it relates to claims against Architects. It also had the practical effect of extending the statute of limitations on claims as to Architects by four years - from two years to six years - virtually overnight.[2]

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[1] It is often stated that **MCLA § 600.5839** is a statute of limitations ***and*** repose, and depending on the accrual date of a claim that can be true. For example, where a claim accrues more than two years before the six year repose period elapses, it is time barred by the two year period set out in **MCLA § 600.5805(6)**, if it was not filed within two years of accrual. However, if a claim accrues where less than two years remains in the six year repose period set out at **MCLA § 600.5839**, then **MCLA § 600.5839** has a ***limitations*** effect, acting as a statute of limitations and cutting off the viability of the claim if it is not brought within six years of the date of use, occupancy or acceptance of the completed improvements. By contrast, where a claim does not accrue within the six year period it prescribes, **MCLA § 600.5839** has a ***repose*** effect, preventing the claim from ever accruing

[2] While that is not a precise proposition, it is illustrative of the effect. Under a traditional accrual analysis a malpractice claim would accrue at that last date of service on the Project, which is often somewhat later than use, occupancy or acceptance, but not substantially so.

In essence, the **Ostroth** panel turned a blind eye to the legal distinction between a Statute of repose and a Statue of Limitations as well as the delicate balance the **Witherspoon** Court has struck. As a consequence, the **Ostroth** panel ruled that **MCLA § 600.5805(6)** does not in fact establish the limitations period for claims against Architects, Engineers and Contractors. The conclusion is at odds with the Statutes themselves and established precedent, as well as governing rules of procedure.

On May 12, 2005, this Court granted Defendants / Appellants Edwuard Schulak, Hobbs & Black, Inc.'s Application for leave to Leave to Appeal from the decision in **Ostroth**. For the reasons set forth hereinafter, AIAM supports the position taken by the Defendants / Appellants and urges this Court to reverse **Ostroth**, correct the myriad substantive and procedural errors it reflects, and restore the well-reasoned balance the applicable Statutes demand, that which the **Witherspoon** Court struck.

The impacts on those engaged in the design and construction professions are vast. Architects and Engineers in particular, factored the shorter limitations period into the risks associated with their projects, and quoted fees accordingly. Likewise, their insurers undertook a similar analysis when quoting malpractice insurance premiums. Both expectations were reasonable in light of controlling law, and both were stood on their ear by the **Ostroth** decision. The costs of malpractice insurance for Architectural and Engineering firms will rise dramatically, and those costs will be passed along to consumers in the form of higher fees. Those increases, together with the costs of prolonged claim exposures and litigation **Ostroth** will engender, will have an inflationary effect on the already high costs of construction in this State.

If the effects of **Ostroth** are to be mitigated, this Court must act to resolve the conflict between **Ostroth** and **Witherspoon**, and between **Ostroth** and the underlying Statutes.

Substantively **Ostroth** presents a question of significant jurisprudence and involves an issue that is derivative of an underlying conflict in various rulings promulgated by the Court of Appeals. As a procedural proposition, **Ostroth** reflects a flagrant disregard of the basic rule to the effect that the subsequent panels of the Court of Appeals are obligated to follow established precedent.[3] In addition, the **Ostroth** decision upsets years of established and reasonable expectations and works a substantial injustice.

AIAM and its member Architects have an obvious interest in the principled, reliable and harmonious application of Michigan law as it relates to claims against Architects. They seek nothing more than to see the judicial system work to ensure that each Statute is read in a manner so as to bring into practice the underlying legislative intent in a manner that fosters predictability, and the economic stability that predictability engenders. AIAM accordingly submits this Amicus Curiae Brief in an effort to assist the Court to further that goal.

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[3] Refer generally to **MCR 7.215(C)(2)** and **MCR 7.215(J)**.

V. STANDARD OF REVIEW

This Case presents questions requiring the review of a grant or denial of Summary Disposition as well as statutory interpretation. This Court reviews de novo, the grant or denial of summary disposition, **American Federation of State Co & Municipal Employees v Detroit, 468 Mich 388; 662 N.W.2d 695 (2003)** Likewise, this Court reviews questions of statutory interpretation de novo, **In re MCI, 460 Mich 396; 596 N.W.2d 164 (1999)**.

VI. ARGUMENT

AIAM first addresses the specific questions the Court posed in its May 12, 2005, Order granting leave to appeal:

A. MCLA § 5839(1) IS HARMONIOUS WITH AND THEREFORE DOES NOT PRECLUDE APPLICATION OF MCLA § 5805 TO CLAIMS AGAINST ARCHITECTS, ENGINEERS AND CONTRACTORS

As a basic proposition, when considering this question, the Court must apply the accepted rule that the terms of Statutory provisions having a common purpose should be read in pari materia, **Jennings v Southwood, 446 Mich 125 (1994)**. The object of this rule is to give effect to the Legislative purpose as found in Statutes on a particular subject, **Id, at 137**. Conflicting provisions of a Statute must be read together to produce a harmonious whole and to reconcile any inconsistencies wherever possible, **Gross v General Motors Corp, 448 Mich 147, 164; 528 N.W.2d 707 (1995); Weems v Chrysler Corp, 448 Mich 679, 699-700; 533 N.W.2d 287 (1995)**.

As **MCLA § 5839(1)** and **MCLA § 5805** affect the vitality and timing of claims against Architects, Engineers and Contractors, there can be no doubt they have a common purpose. When this interpretive rule is applied and those purposes are considered, as discussed hereinafter, it is apparent that **MCLA § 5839(1)** is harmonious with, and does not preclude application of **MCLA § 5805**. The **Witherspoon** Court recognized and embraced that harmony while the **Ostroth** Court disregarded its obligation to read the Statutes harmoniously, instead doing extreme violence to all notions of principled jurispridence.

1. Ostroth Strips MCLA § 600.5839 of any Repose Effect

The **Ostroth** Court correctly recognizes that **MCLA § 600.5839** is intended to be a Statute of both limitations and repose.[4] In that regard, the **Ostroth** Court observed:

> "The **O'Brien** Court[5] stated that **§ 5839** was "both one of limitation and one of repose." **O'Brien, supra at 15**."

Indeed, while that may be the recognized intent, even a casual reading of **Ostroth** makes plain it leaves **MCLA § 5839** without any repose effect.

The principal difference as between limitations and repose is rooted in the question of accrual. Where a statute ends the viability of a claim after it accrues due to the running of a statutory period, the statute is one of the limitations. In the converse, where a claim that has not accrued is cut off due to the running of a statutory period, its accrual thereafter is prevented by operation of law, and the statute is of one of repose. Thus, in order for a statute to have repose effect, it must end the viability of a claim that has not accrued.

Applying those principles to individual cases, it is apparent that under the **Ostroth** analysis a claim accrues at either " . . .occupancy of the completed improvement, use, or acceptance of the improvement . . ." or the date on which Architect discontinues serving the client in a " . . . professional or pseudo professional capacity . . .," depending on whether **MCLA § 600.5839** is read in isolation, or whether it is read together with

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[4] Indeed, as the Michigan Supreme Court has reached that conclusion, the **Ostroth** Court is bound by that conclusion even if it disagreed.

[5] **O'Brien v Hazelet & Erdal, 410 Mich 1; 299 N.W.2d 336 (1980)**

MCLA § 600.5838.[6] In either case, the claim will accrue at the date of " . . .occupancy of the completed improvement, use, or acceptance of the improvement . . .," or shortly thereafter when service is discontinued. Therefore, by definition, accrual will necessarily occur long before a period of six years from the " . . .occupancy of the completed improvement, use, or acceptance of the improvement . . ." has run. As such, despite the fact that this Court concluded in **O'Brien, supra**, that **MCLA § 600.5839** had both a repose and a limitation effect, the **Ostroth** logic can only have one sort of effect - specifically to cut off a claim once it accrues. Indeed, no reasonable construction can be afforded **MCLA § 600.5839** under which it will ever have a repose effect (i.e.; cutting off a claim that has not accrued after the running of a statutory period) in a manner consistent with **Ostroth** as a matter of both fact and law.

Thus, despite lip service to the contrary, the end result in **Ostroh** renders **MCLA § 600.5839** a limitations Statute, utterly devoid of any arguable repose effect.

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[6] **MCLA § 600.5838** sets forth rules which determine the date of accrual of malpractice claims and provides in pertinent part:

> Claim based on malpractice; accrual; commencement of action; burden of proof; limitations.
>
> Sec. 5838. (1) Except as otherwise provided in section 5838a, a claim based on the malpractice of a person who is or holds himself or herself out to be, a member of a State licensed profession accrues at the time that person discontinues serving the plaintiff in a professional or pseudoprofessional capacity as to the matters out of which the claim for malpractice arose, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim.

2. Witherspoon does not Suffer the same Defect

By contrast with **Ostroth** the result in **Witherspoon** suffers from none of the foregoing defects. Indeed, **Witherspoon** does not strip **MCLA § 600.5839** of its repose effect. To the contrary, it represents a fair and balanced reading of all applicable Statutes.[7]

Following the interpretive scheme set out by the **Witherspoon** Court, it is apparent that it reflects none of the shortcomings from which the **Ostroth** scheme suffers. Initially, commonly accepted accrual principles as set out in **MCLA § 600.5838** are left intact, and form the starting point for the analysis. Pursuant to **MCLA § 600.5805(6)**, malpractice claims not brought against an Architect within two years of that date of accrual would be time barred by **MCLA § 600.5805(6)**, functioning as a Statute of ***Limitations*** (i.e.; cutting off a viable claim after the running of a fixed period of time commencing at accrual).

Reading **MCLA § 600.5838** together with **MCLA § 600.5805(6)** and **MCLA § 600.5839**, it is apparent that **MCLA § 600.5839** has a "limitations and repose effect," consistent with the conclusion reached by the Court in **O'Brien**. Indeed, where a claim against an Architect accrues more than four years, but less than six years after " . . occupancy of the completed improvement, use, or acceptance of the improvement . . ." **MCLA § 600.5839** has a ***Limitations*** effect -, i.e.; it cuts off a viable claim after the running of a fixed period of time commencing at accrual.

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[7] Notably, despite all of the shortcomings it created, the **Ostroth** panel, citing **Farmers Ins Exchange v AAA of Michigan, 256 Mich App 691, 695; 671 N.W.2d 89 (2003)**, obliquely accused the **Witherspoon** panel of engaging in a statutory analysis which departed from "common sense". Indeed, one of the respective approaches does depart from "common sense", but AIAM takes exception to the **Ostroth** Court's contention that it was the **Witherspoon** panel that was afflicted with that malady.

Since under that analysis, **MCLA § 600.5805(6)** would provide a longer period of time, **MCLA § 600.5839** would govern.

By contrast, where a period of six years running from " . . .occupancy of the completed improvement, use, or acceptance of the improvement . . ." expires and claim has not accrued, the running of that six-year period thereafter precludes the claim from accruing. In that example, **MCLA § 600.5839** has a ***Repose*** effect -, i.e.; it prevents a claim that has not yet accrued from ever accruing after the running of a prescribed period by operation of law.

Thus it is apparent that while the **Ostroth** Court is critical of the **Witherspoon** analysis because it views that analysis inconsistent with the commands of the **O'Brien** Court, a close reading of the respective approaches reveals that **Witherspoon** is in fact consistent with the commands of **O'Brien** while **Ostroh** is not. It is therefore apparent that the **Ostroh** analysis suffers from the very malady of which it accuses **Witherspoon**.

In sum, as the **Witherspoon** Court concluded, if **MCLA § 5839(1)** is afforded ***REPOSE*** effect and **MCLA § 5805** afforded ***LIMITATIONS*** effect, the two provisions can be read harmoniously, with neither excluding any portion of the other.

It is a cardinal rule that in the construction of a statute, effect is to be given, if possible, to every clause and section of it, and it is the duty of Courts, as far as practicable, so to reconcile the different provisions as to make the whole act consistent and harmonious. If this becomes impossible, it is necessary to give effect to what was the manifest intention of the Legislature, although in so doing the Court may restrict the meaning or application of general words, **Remus v City of Grand Rapids, 274 Mich 577,**

265 N.W. 755 (1936). Here, the Court has an essential choice - read **MCLA § 5839(1)** as a Statute of Limitation to the complete exclusion of **MCLA § 5805** as the **Ostroth** Court did, or read it as a statute of repose consistent and harmonious with the limitations effect of **MCLA § 5805** as the **Witherspoon** Court did.

Consistent with the commands of **Jennings, supra; Gross; supra; Weems, supra** and **Remus, supra**; the Court must of course read the statues harmoniously. When it does so, the Court must conclude that **MCLA § 5839(1)** is harmonious with and therefore does not preclude application of **MCLA § 5805** as a matter of law. **Withserspoon** is therefore an appropriate reading, while the aberrant reading, the **Ostroth** Court injected must be rejected as a matter of law.

B. RELATIVE TO ARCHITECTS MCLA § 5805(6) CONTROLS OVER MCLA § 5805(10)

Once it is determined that **MCLA § 5839(1)** has a repose effect that must be read against the limitations periods set out in **MCLA § 5805**, the inquiry turns to which sub-section of **MCLA § 5805** applies.[8] Relative to claims against Architects, the two-year period set out at **MCLA § 5805(6)** governs over the general three year period sets out at **MCLA § 5805(10)**. In specific, the Statute provides:

> **Sec. 5805.** (1) A person shall not bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first accrued to the Plaintiff or to someone through whom the Plaintiff claims, the action is commenced within the periods of time prescribed by this section.
>
> (6) Except as otherwise provided in this chapter, the period of limitations is two years for an action charging malpractice.

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[8] Except in those cases where accrual occurs within that number of years prescribed by **MCLA § 5839(1)**, in which case it has a limitations effect.

> (10) The period of limitations is three years after the time of the death or injury for all other actions to recover damages for the death of a person, or for injury to a person or property.

Thus the question becomes whether the two-year period set out at subsection (6) applies, or whether the three-year period set out at subsection (10) applies. The answer is found in common law.

In defining malpractice for purposes of the Statute of Limitations, this Court has previously found that the Legislature intended that malpractice would be defined according to the common-law definition of the term, and thus only those groups traditionally liable for malpractice would be benefitted by the two-year Statute of Limitations applicable to malpractice actions, where other groups would be subject to the three-year general negligence limitations period, **Sam v Balardo, 411 Mich 405, 308 N.W.2d 142 1981** (where the Court concluded that Attorneys fell within the two -year limitations period for the same reasons as physicians). In **Sam**, the Court noted that the Revised Judicature Act does not define the term "malpractice" as used in **§ 5805**. Accordingly, the Court held that "malpractice" within the meaning of § **5805** must refer only to those actions which were recognized at common law as constituting malpractice when the Judicature Act of 1915 and the Revised Judicature Act of 1961 were adopted.

Thus, the inquiry turns to whether Architecture was a recognized profession prior to the enactment of the Revised Judicature Act of 1961.[9]

Relative to Architects, the Michigan Supreme Court has long ago noted that "the responsibility of an Architect does not differ from that of a lawyer or physician.", **Bayne v Everham, 197 Mich 181, 199-200; 163 N.W. 1002 (1917)**. That observation predates the Revised Judicature Act of 1961, and the underlying case predates the Judicature Act of 1915. Likewise, the Michigan Statute which first required Architects to be licensed (**PA 1937, No 240 (CL 1948, § 338.551 et seq. [Stat Ann 1949 Cum Supp § 18.84 (1) *et seq.*]**) predates the Revised Judicature Act of 1961 by nearly 25 years. In addition, causes of action for Architectural malpractice were recognized in Michigan as early as 1898, long before the Revised Judicature Act of 1961.[10] Thus, it is apparent as to Architects, they were required to answer for mis-performance of their duties at common law, long before either the Revised Judicature Act of 1961 or the Judicature Act of 1915 became law.

As there can be no credible question as to whether the Architectural profession was recognized at common law prior to the enactment of the Revised Judicature Act of 1961, the two-year limitation period set out at **MCLA § 5805(6)** controls over the general three year period set out at **MCLA § 5805(10)**.

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[9] See also **Local 1064, RWDSU AFL-CIO v Ernst & Young, et. al., 449 Mich 322; 535 N.W.2d 187 (1995)** where the Court recognized that due to the nature of the responsibilities and the recognition of malpractice claims within the profession Accountants also fell within the two year malpractice limitation section currently set out at sub-section 6.

[10] See generally **Harley v. Blodgett Engineering and Tool Co., 230 Mich 510; 202 N.W. 953 1925; Bayne v Everham, 197 Mich 181, 199-200; 163 N.W.1002 (1917)**, citing **Chapel v. Clark, 117 Mich. 638; 76 N.W. 62 (1898)**

C. THE OSTROTH COURT TURNED A BLIND EYE TO THE COMMANDS OF MCR 7.215

The Court of Appeals is constrained in terms of that range of decisions it is empowered to render. As an intermediate Court in a precedential system, is it required to analyze and follow established precedent. In specific, **MCR 7.215** speaks to this obligation and provides, in pertinent part:

> **Rule 7.215 Opinions, Orders, Judgments and Final Process From Court of Appeals.**
>
> **(C) Precedent of Opinions**
>
> (2) A published opinion of the Court of Appeals has precedential effect under the rule of stare decisis . . .
>
> * * *
>
> **(J) Resolution of Conflicts in Court of Appeals Decisions**
> (1) *Precedential Effect of Published Decisions* a panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals as provided in this rule.[11]

Thus, where the Court of Appeals is presented with its own precedent that speaks to a specific issue, dated on or after November 1, 1990, the proposition that the Court of Appeals must follow that precedent is beyond any credible dispute.

Indeed, the Court of Appeals has for the most part faithfully followed that command. In general, the Court of Appeals has consistently rejected arguments that were predicated on opinions issued prior to the November 1, 1990, cut-off date in the face of contrary

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[11] This portion of the Rule derives from Administrative Order 1994-4, which was created in an effort to address and eliminate (or at least reduce) conflicts within the jurisprudence developed by the various panels of the Court of Appeals. This is often referred to as "the first out" rule.

precedent issued afterwards (see **Mitchell v City of Detroit, 264 Mich App 37; 689 N.W.2d 239 (2004)**), has rejected outright contrary precedent that was issued prior to the November 1, 1990 cut off date (see **Costa v Community Emergency Med Services, 263 Mich App 572; 689 N.W.2d 712 (2004)**), and has departed from precedent subject to the rule only where significant distinctions can be drawn (see generally **People v Doxey, 263 Mich App 115; 687 N.W.2d 360 (2004)** where the panel noted the rule and its obligation to follow it, but found distinctions between the cases cited as precedent and the case at bar). As Justice Murray noted in his dissent in **Feyz v Mercy Mem Hosp, 264 Mich App 699; 692 N.W.2d 416, 436 (2005); 2005 Mich App LEXIS 49 (Murray, J., dissenting):**

> Hence, without overruling **Sarin**[12] and parts of **Long**[13] (***which cannot be done under MCR 7.215(J)(1)***), the majority cannot reach the legal conclusions that it has reached today.

Setting aside the substance of the dispute in **Feyz** (which is not directly relevant here) Justice Murray correctly notes the effect of **MCR 7.215(J)(1)**. ***Simply put, a panel of the Court of Appeals is bound to follow Court of Appeals precedent issued after November 1, 1990, and has no discretion to depart therefrom in any manner consistent with the MCR 7.215(J)(1) rule.***

While the **Ostroth** panel did recognize it was constrained by the limiting effect of **MCR 7.215(J)(1)**, it soon cast that recognition aside. While the **Ostroth** Court noted it was

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[12] **Sarin v Samaritan Health Center, 176 Mich App 790; 440 N.W.2d 80 (1989)**. Justice Murray noted that **Sarin** preceded the formalization of the first out rule by over a year, but suggested that as with all precedent it should nevertheless be followed unless readily distinguishable.

[13] **Long v Chelsea Community Hospital, 219 Mich App 578; 557 N.W.2d 157 (1996)**.

bound by the result in **Witherspoon, spura**, it concluded that **Witherspoon** was contrary to two prior cases, **Michigan Millers Mutual Insurance Company v West Detroit Building Company, Inc, 196 Mich App 367; 494 N.W.2d 1 (1992)**; and **O'Brien v Hazelet & Erdal, 410 Mich 1; 299 N.W.2d 336 (1980)**. In light of that observation, the **Ostroth** panel concluded:

> Therefore, the holding in **Travers Lakes**[14] is in direct conflict with that of **Witherspoon**. Generally, we would be bound to follow the precedent established by **Witherspoon** as it was decided before **Travers Lakes**. **MCR 7.215(I)(1)** However, we find that our Supreme Court's decision in **O'Brien, supra** and this Court's decision in **Michigan Millers**, which was decided two years before **Witherspoon**, are controlling. Pursuant to the doctrine of stare decisis, **People v Hall, 249 Mich App 262; N.W.2d 253 (2002)**, and Michigan's "first out" rule, **MCR 7.215(J)(1)**, we are required to follow these decisions, which, incidentally, we believe were decided correctly.

Thus the **Ostroth** panel recognized its obligation to follow the first out rule and adhere to **Witherspoon**, but rejected it in favor of two specific instances of earlier precedent which it concluded controlled **Witherspoon** through application of the first out rule. Each of the cases cited as support is readily distinguishable from the case at bar. Each case is addressed in turn:

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[14] **Traver Lakes Community Maintenance Ass'n v Douglas Co., 224 Mich App 335; 568 NW2d 847 (1997)**. Although the **Ostroth** panel believes **Traver Lakes** is at odds with **Witherspoon**, it concedes the first out rule precludes its application here. Thus the question of whether **Traver Lakes** is correctly decided is not reached, nor is its impact on the current proceedings.

1. O'Brien v Hazelet & Erdal, 410 Mich. 1; 299 NW2d 336 (1980)

As **O'Brien** is a creature of the Supreme Court, the **Ostroth** panel would remain obligated to follow it assuming it cannot be reconciled with the case at bar, irrespective of any application of the first out rule. A close reading of **O'Brien** makes plain however that **O'Brien** is not controlling.

The **O'Brien** Court actually considered a number of cases, all of which raised the same issue, and which were consolidated for hearing. The specific question presented was whether **MCLA 600.5839** violated the equal protection clause or due process guarantees set out in the Michigan Constitution. As the Supreme Court noted:

> We granted leave to appeal in these four cases to resolve whether **MCL 600.5839(1); MSA 27A.5839(1)** "[violates] equal protection of the law or due process guarantees (a) in denying a cause of action to persons allegedly injured from negligent design or supervision of construction by State-licensed architects or professional engineers completed more than six (6) years before the injury; and (b) by limiting the tort responsibility of licensed architects and professional Engineers but not licensed Contractors."[15]

The Court in the **O'Brien** cases concluded that **MCLA § 600.5839** was not unconstitutional. The question of interaction between **MCLA § 600.5839** and **MCLA § 600.5805(6)**, the dispositive question here, was not presented in **O'Brien**. Thus **O'Brien** does not control **Witherspoon**, and as such it finds no application here. The analysis therefore turns to **Michigan Millers**.

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[15] At the time **O'Brien** was decided, **MCLA § 600.5839** did not include claims against Contractors within its scope. It was later modified such that its scope included claims as to them.

2. Michigan Millers Mutual Insurance Company v West Detroit Building Company, Inc, 196 Mich App 367; 494 N.W.2d 1 (1992)

As **Michigan Millers** is a creation of the Court of Appeals, the **Ostroth** panel would be obligated to follow it under the first out rule, as it was issued after the November 1, 1990 effective date, ***assuming it is in conflict and cannot be reconciled with the case at bar***. Again however a close reading of **Michigan Millers** makes plain it is distinguishable and is not controlling.

Any understanding of **Michigan Millers** must begin with an understanding of **Burrows v Bidigare / Bublys Inc, et. al., 158 Mich App 175; 404 N.W.2d 650 (1987)**. There, Plaintiff physicians entered into a contract with the Defendant Architectural firm for the design of a medical clinic. After occupancy, air and water leakage problems developed that were later resolved by Architects and Contractors other than those responsible for the original design. When the Plaintiff brought suit, the Architectural firm moved for accelerated judgment on the strength of non-compliance with the two-year malpractice Statute set out at **MCLA § 600.5805(6)**, the Trial Court and denied the Motion on the strength of the six-year period set out at **MCLA § 600.5839**.

On appeal, the Court of Appeals considered the interplay between at **MCLA § 600.5805(6)** and **MCLA § 600.5839**, and concluded:

> Several other States have had occasion to rule on the issue of whether suits for damages for deficiencies in the improvement itself are within the coverage of Statutes similar to **MCLA 600.5839; MSA 27A.5839**.
>
> * * *
>
> The collective cases indicate a general consensus that the appropriate statute of limitation is the one applicable to breach of contract actions. In Michigan, the pertinent statute is **MCLA 600.5807(8);MSA 27A.5807(8)**, which provides for a six-year limitation. The instant suit was brought within six- years of the time the

> building was completed and occupied. Therefore, Plaintiff's action is not time barred by the Statute of Limitation. We therefore find no basis to reverse on this ground.

Thus, although the question of the interplay of **MCLA § 600.5805(6)** and **MCLA § 600.5839** is ostensibly presented, it is apparent that the majority does not reach that question, opting instead to determine the issues presented are governed by the Statute of Limitation applicable to breach of contract actions, and also to adhere to the notion that the analysis differs if one considers a claim to be a defect in the improvement at issue itself and those claims "arising out of" the defect.[16] Thus, the majority opinion in **Burrows** does not advance the issue at hand.

That however is not the end of the analysis. Regarding the question of a distinction between defects in, and damages arising out of, the improvement at issue, Justice Burns, writing in dissent in **Burrows**, observed:

> Because I believe that the Circuit Court erred by granting accelerated Judgment in favor of Defendants on the ground that the claims were required to be submitted to arbitration, I must also determine whether accelerated Judgment could properly have been granted on the basis of the Statute of Limitation. I believe that the Trial Court properly declined to grant accelerated Judgment in favor of Defendants on that ground.
>
> * * *
>
> I disagree with the majority and with the panel in **Marysville v Pate Hirn & Bogue, Inc, 154 Mich App 655; 397 N.W.2d 859 (1986)**, that a distinction should be made between a suit for injuries "arising out of" an architectural defect and a suit "for the defect" itself.

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[16] The majority cites **Marysville v Pate Hirn and Bogue Inc, 154 Mich App 655; 397 N.W.2d 859 (1986)** for support for the proposition that the breach of contract statute governs.

Justice Burn's dissent thus becomes the point of departure for the continuation of the analysis by the **Michigan Millers** Court.

The issue in **Michigan Millers** was the collapse of the wood roof in a restaurant building due to alleged defects in the design or manufacture of the trusses. Specifically, the Michigan Millers Plaintiffs argued that the Trial Court erred in dismissing their Complaint on the ground that their claims were time-barred as a matter of law by **MCLA § 5839(1)** because that Statute does not apply to claims seeking damages for deficiencies in the improvement to real property itself. In support of their position, the Plaintiffs cited **Marysville v Pate Hirn & Bogue Inc, 154 Mich App 655; 397 N.W.2d 859 (1986), Midland v Helger Construction Co Inc, 157 Mich App 736; 403 N.W.2d 218 (1987)**, and **Burrows, Supra**, where panels of the Court of Appeals drew a distinction between injuries "arising out of" a defective improvement to real property and damages that constitute the defective improvement itself, and held that the limitation set forth in **MCLA § 5839(1)** that bars claims filed more than six years after occupancy did not apply to claims made by the building owner for the defective improvement itself, but only to third-party claims for injuries that "arise out of" the defective improvement. Thus, the Plaintiffs, as owners of the damaged building, maintained that the limitation periods set forth in **MCLA § 5839(1)** did not apply to them as the injury complained of was to the improvement itself. Although the respective statutory sections had undergone recent revision, and although the Legislature had amended **MCLA § 5805(10)** to refer to **MCLA § 5839(1)**, the Legislature did not remove the "arising out of" language in **MCLA § 5839(1)**. That, the Plaintiff argued, was evidence that the Legislature intended to leave the distinction in place.

The **Michigan Millers** Court rejected that argument, concluding instead that the Legislative modifications to the Statute between had the effect of adopting the Burns dissent in **Burrows**. Specifically, the **Michigan Millers** Court concluded:

> Contrary to Plaintiffs' assertion, we do not believe that failure of the Legislature to strike the "arising out of" language of **§ 5839(1)** while at the same time amending **§ 5805(10)** to refer to **§ 5839(1)** indicates that the Legislature consented to the accuracy and continued validity of this Court's prior holdings. That the Legislature may have inartfully expressed its intent and could have chosen more suitable alternatives to accomplish its purpose does not alter the fact that the Legislature sought to set aside this Court's holdings in **Marysville**, **Midland**, and **Burrows**.

Thus, the specific question presented in **Michigan Millers**, i.e.; whether the Legislature intended to abrogate the "airing out of" distinction for Statute of Limitations analysis purposes, if of no moment here. **Witherspoon**, supra remains "first out", and contrary to the conclusion reached by the **Ostroth** Court, the **Ostroh** Court was obligated by **MCR 7.215** to follow it.

3. Subsequent Treatment

Indeed, at least some Michigan Circuit Courts have subsequently adopted this precise view, and have refused to follow **Ostroth** on the strength of **MCR 7.215**. The Honorable Charles Stark, in an opinion dated November 17, 2004 in **Auto-Owners Insurance Company v Northern Awning and Window LLC, et. al., opinion and order by Judge Stark of the Alger County Circuit Court, decided November 17, 2004 (Trial Court Number 03-4005-NZ; Court of Appeals Number 25948**) (appended hereto at Exhibit "A," a case with facts virtually identical to those in **Ostroth**), noted:

> The issue is whether this lowly Court is bound to follow **Witherspoon** or **Ostroth** that *sub silentio* overruled **Witherspoon**. This in turn is governed by **MCR 7.215(C)(2)** and **(J)(1)**. If **Witherspoon** became the law of the land by reason of being "first out", then **Ostroth** is not binding. Plaintiff, together with the **Ostroh**

> Opinion claims that the Supreme Court's decisions in **O'Brien** and **Michigan Millers**, decided two years before **Witherspoon**, were "first out" and, thus, makes Ostroth binding precedent and that **Witherspoon** was wrongly decided. It is necessary to examine these cases not only for their recitations of law, but also as to how these recitations focus on the facts before the Courts. In **Millers**, the search was for legislative intent; in **O'Brien** equal protection and due process was the focus, With this precise factual background in mind then, **Witherspoon** is really a case of first impression and is the first case out that addresses the fact issue as it arises in this case. When **O'Brien** and **Michigan Millers** are examined, they are not first-out opinions directly on-pont with our fact situation. This Court is bound by **Witerspoon**. Appeal is hereby certified if applied for.

Thus, it is apparent that the proposition that **Witherspoon** remains controlling law in at least some of the Circuit Courts is alive and well.[17]

4. A Sole Panel of the Court of Appeals cannot Depart from or Otherwise Alter Court of Appeals Precedent

Consistent with the "first out" rule (which was adopted to eliminate splits of authority among various panels), the Court of Appeals must follow a strict procedure in when considering subsequent cases.

First, the Court must determine whether the "first out" rule applies. Where a prior Opinion of the Court of Appeals was issued on or after November 1, 1990, as the **Witherspoon** Opinion was here, the Rule applies. Further analysis must therefore occur within the context of the Rule.

Second, the Court must determine whether a substantive distinction exists between

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[17] Although AIAM believes that **Witherspoon** presents a fair and balanced reading of all applicable Statutes, at a minimum, the fact that some disagreement exists among various Michigan Trial Courts militates in favor of this Court's consideration and resolution of the issue.

the case at bar and any opinion that are subject to the operation of the Rule. Here, there is no substantive distinction to be drawn between the facts in **Ostroh** and the facts in **Witherspoon**.

Finally, where the Rule applies, and where no distinction can be drawn between the case at bar and any opinion that are subject to the operation of the Rule, the Court of Appeals has no discretion and there is but one course of conduct consistent with the "first out" rule - specifically, to follow the Case that is subject to it. The Court of Appeals has no discretion which would permit it to depart from its own precedent, and even assuming the Court concludes a case was wrongly decided, the Court must continue to follow it.[18] There are but three ways to alter such precedent - 1) through Legislation; 2) through subsequent modification by the Supreme Court; or 3) through reconsideration by the Court of Appeals sitting en banc. None of those courses were embarked upon here, and the Court of Appeals is accordingly bound by **Witherspoon** as a matter of law.

In disregarding **Witherspoon** the **Ostroth** panel in the Court of Appeals accordingly committed at minimum a procedural error which this Court must review and correct.[19]

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[18] The Ostroth Court noted "We believe that **Witherspoon** was wrongly decided." Although it is not clear what that belief played in its consideration of the issues, the belief itself is inconsistent with the "first out" rule and it is per se impermissible for the Court of Appeal to act on that belief.

[19] Notably, the Federal Courts rigorously adhere strictly to a version of the "first out" rule (see **Brabham et. al. v A.G. Edwards & Sons Inc, et. al., 376 F3d 377 (5th Cir., 2004)**. At bottom, the "first out" rule is little more than a principled application of the concept of stare decisis on which our precedential system is based.

D. A STRICT READING OF OSTROTH ENGENDERS RESULTS THAT CANNOT BE RECONCILED WITH TRADITIONAL STATUTE OF LIMITATIONS AND ACCRUAL PRINCIPLES, AND GENERAL COMMON SENSE

The framework within which questions of statutory construction and interpretation must be considered is long and well settled. As this Court noted in **Robertson v Daimler-Chrysler Corp, 465 Mich. 732; 641 N.W.2d 567 (2002)**:

> When reviewing matters of statutory construction, this Court's primary purpose is to discern and give effect to the Legislature's intent, **Turner v Auto Club Ins Ass'n, 448 Mich 22, 27; 528 N.W.2d 681 (1995)**. The first criterion in determining intent is the specific language of the Statute, **DiBenedetto, supra at 402**. The Legislature is presumed to have intended the meaning it has plainly expressed, and if the expressed language is clear, judicial construction is not permitted and the Statute must be enforced as written, Id. Additionally, it is important to ensure that words in a statute not be ignored, treated as surplusage, or rendered nugatory, **Hoste v Shanty Creek Management Inc, 459 Mich 561, 574; 592 N.W.2d 360 (1999)**. Unless defined in the statute, every word or phrase of a statute will be ascribed its plain and ordinary meaning, See **MCL 8.3a**. See also **Western Mich Univ Bd of Control v Michigan, 455 Mich 531, 539; 565 N.W.2d 828 (1997)**.
>
> In addition, as Justice Cavanaugh notes in his dissent in **Waltz v Wyse, 469 Mich 642; 677 N.W.2d 813 (2004)**:
>
> > It has long been recognized that "the Court may depart from strict construction principles when a literal reading of the Statute will produce absurd or illogical results, and this Court should attempt to give effect to all relevant statutory provisions." **DiBenedetto v West Shore Hosp, 461 Mich 394, 408; 605 N.W.2d 300 (2000) (CAVANAGH, J., dissenting), citing Gross v Gen Motors Corp, 448 Mich 147; 528 N.W.2d 707 (1995), and In re Landaal, 273 Mich 248, 252; 262 N.W. 897 (1935)**.

It is against this backdrop that the Court must consider the current question.

1. Ostroth Creates a Class of Case that Can Never Accrue

The **Ostroth** Court reads **MCLA § 600.5839** to the complete exclusion of **MCLA § 600.5805(6)**. In so doing, the **Ostroth** Court turns a blind eye to the more refined principles of accrual, adopting instead a mechanical rule that applies to all claims against Architects, Engineers and Contractor. Under that mechanical rule, any claim brought ". . . more than six (6) years after the time of occupancy of the completed improvement, use, or acceptance of the improvement . . ." is time barred. Said in the converse, under that rule, a Plaintiff has a window of six years commencing from the date of use, occupancy or acceptance of a completed improvement, in which to bring a claim. Under the logic set forth by the **Ostroth** Court, that rule is absolute and applies to all claims.

While the rule in that genesis may apply to many cases which can be brought against an Architect, Engineer or Contractor, it engenders a question which the **Ostroh** analysis simply cannot answer. Specifically, what happens where an Architect, Engineer or Contractor renders service, but that service either does not result in a "completed improvement', or the "completed improvement" is substantially delayed? Examples of those sorts of services abound, and include, but are certainly not limited to:

1. A scenario where an Architect, Engineer or Contractor is engaged to assist a client in determining whether a Project is feasible, but where the feasibility study does not result in a "completed improvement";

2. A scenario where an Architect, Engineer or Contractor is engaged to assist a Building Owner in evaluating the current condition of a building for code compliance or maintenance purposes;

3. A common scenario where an Architect or Engineer is engaged to design an improvement, but delays in the performance of the design service, or defects in the design service itself result in a circumstance where financing fails or other issues engendered by the performance of the design service effectively

prevent the Project from ever going forward [20]; or

4. A scenario where construction is started but for a variety or reasons, related to the design services or otherwise, it can not be or is not completed.

In each example, under a traditional accrual analysis, and under the reading afforded **MCLA § 600.5839** and **MCLA § 600.5805(6)** by **Witherspoon**, these sorts of claims would still accrue - as they well should. However, where the analysis turns exclusively on the date of "occupancy of the completed improvement, use, or acceptance of the improvement," and where that date never occurs, the injured Plaintiff, under the **Ostroth** analysis, apparently holds an inchoate claim that simply never matures.

Whatever the Legislative intent behind the statutory scheme may have been, it is doubtful the legislature intended to work this result. To the contrary, the notion that the Legislature intended to render whole classes of traditional claims to be without remedy is absurd. Nevertheless, it is precisely the result a strict following of the **Ostroth** logic engenders.

2. In the Alternative, Ostroth Creates a Class of Case that is not Subject to a Statute of Limitation

Adopting the opposing argument to the effect that although the **Ostroth** Court reads **MCLA § 600.5839** to the complete exclusion of **MCLA § 600.5805(6)**, it either did not intend to read it to the exclusion of the accrual Statute, or if left that question open, further illustrates the fallacy of the **Ostroth** Court's "logic." Indeed, even a cursory analysis of the accrual statute makes the **Ostroth** shortcomings plain.

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[20] This example is perhaps the most insidious since the Owner's damages may well be caused by the failure of the Architect or Engineer to conform his or her conduct to the prevailing standard of care, yet under the **Ostroth** logic it appears the case cannot accrue.

Regarding accrual of malpractice claims, **MCLA § 600.5838** provides:

> **Claim based on malpractice; accrual; commencement of action; burden of proof; limitations.**
>
> **Sec. 5838. (1)** Except as otherwise provided in section **5838a**, a claim based on the malpractice of a person who is, or holds himself or herself out to be, a member of a state licensed profession accrues at the time that person discontinues serving the plaintiff in a professional or pseudo professional capacity as to the matters out of which the claim for malpractice arose, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim.

Thus, assuming traditional accrual principles remain vital in the wake of **Ostroth**, all claims continue to accrue when the professional relationship between the Architect / Engineer and the Project Owner ends.

That accrual analysis may work reasonably well in circumstances where "... occupancy of the completed improvement, use, or acceptance of the improvement . . ." (the benchmark event which commences the running of the limitation period under **Ostroth**) occurs in the ordinary course. However, taking one of the examples set forth above, (a circumstance where the Owner alleges the Architect negligently delayed the completion of the documents such that the Project could never begin), reading **MCLA § 600.5839** together with **MCLA § 600.5838**, yields a result where the claim is not subject to any limitation. Indeed, such a claim would accrue when the Architect discontinues serving the client in a " . . . professional or pseudo professional capacity . . .," but would never be subject to limitation since " . . .occupancy of the completed improvement, use, or acceptance of the improvement . . ." is never achieved.[21] Thus, as the benchmark which would commence the running of the limitations period never occurs, the limitations period

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[21] The other examples set forth above would work similar results where claims are effectively not subject to any limitations period.

are effectively forever.

3. Witherspoon by Contrast Suffers From None of These Defects

By contrast with **Ostroth** the result in **Witherspoon** suffers from none of the foregoing defects. Indeed, **Witherspoon** does not create a class of case that cannot accrue and does not create a class of case that is not subject to limitation. To the contrary, it represents a fair and balanced reading of all applicable statutes, and it creates none of the patent infirmities a strict application of the "**Ostroth** Rule" would eventually engender.[22]

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[22] While it may take an extended time before facts arise which create vehicles by which those infirmities can be litigated, the fact remains that those circumstances can not be reconciled with the general **Ostroth** rule.

VII. CONCLUSION

Although the Court in **Ostroth** v **Warren Regency G.P., L.L.C, 263 Mich App 1; 687 N.W.2d 309 (2004)** pays lip service to **MCR 7.215** and the "first out" rule it embodies, a detailed reading of the cases which the **Ostroth** Court argues mandate the results it reaches, reveal that they do not in fact control. The Court of Appeals' opinion in **Ostroth** is therefore procedurally flawed and must be reversed. Simply put, even assuming a subsequent panel of the Court of Appeals believes a prior case is "wrongly decided" it has no discretion to depart from established precedent in a manner consistent with **MCR 7.215** and the "first out" rule as a matter of law. **Witherspoon** v **Guilford, 203 Mich App 240; 511 NW2d 720 (1994)** is "first out" under that rule, and subsequent panels of the Court of Appeals is obligated to follow it as a matter of law.

Of a more serious nature is the substance of the **Ostroth** Opinion. In an apparent resort to "common sense," the **Ostroth** panel construes the underlying Statutes in a manner which variously creates classes of cases that cannot accrue, create classes of cases that are not subject to limitations at all, and/or strips Statues with acknowledged repose effects of any credible construction which would engender those effects.

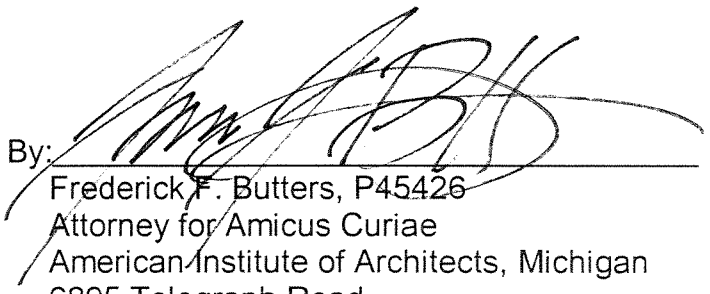
By contrast, the approach in **Witherspoon** reads all of the respective Statutes harmoniously, addressing each prospective class of case, subjecting each to reasonable limitation or repose periods, without the creation of any odd or absurd results. Thus, even assuming that the **Ostroth** decision is not the product of a procedural flaw, **Witherspoon** is the better reasoned rule and must be followed. Adopting that approach implicitly reconciles all aspects of the governing statutes, and addresses all questions this Court

raised in its May 12, 1005, Order granting the Application for Leave to Appeal.

WHEREFORE for the foregoing reasons, Amicus Curiae **AMERICAN INSTITUTE OF ARCHITECTS, MICHIGAN** respectfully prays that this Honorable Court critically review of the Court of Appeals decision in **Ostroth v Warren Regency G.P. L.L.C, 263 Mich App 1; 687 N.W.2d 309 (2004)**, and vacate that decision due to its procedural and substantive shortcomings, in favor of the decision in **Witherspoon v Guilford, 203 Mich App 240; 511 N.W.2d 720 (1994)**, which represents the far better reasoned rule.

Respectfully submitted,

THOMAS M. KERANEN & ASSOCIATES, P.C.



By: _____

Frederick F. Butters, P45426
Attorney for Amicus Curiae
American Institute of Architects, Michigan
6895 Telegraph Road
Bloomfield Hills, MI 48301-3138
(248) 647-9653 (248) 647-9683 (Fax)

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